

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-44-09

(UNFAIR LABOR PRACTICE)

ROSEBURG POLICE EMPLOYEES	)	
ASSOCIATION,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
CITY OF ROSEBURG,	)	AND ORDER
	)	
Respondent.	)	
_____	)	

On February 28, 2011, this Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald, on December 7, 2010, following a hearing on May 26, 2010, in Salem, Oregon. The record closed on July 12, 2010, upon receipt of the parties' post-hearing briefs.

Rhonda J. Fenrich, Attorney at Law, Garrettson, Gallagher, Fenrich & Makler, P.C., Eugene, Oregon, represented Complainant.

David Thompson, Attorney at Law, Bullard Smith Jernstedt Wilson, Portland, Oregon, represented Respondent.

On September 24, 2009, the Roseburg Police Employees Association (Association) filed an unfair labor practice complaint against the City of Roseburg (City) alleging that

the City violated ORS 243.672(1)(e) by unilaterally changing the *status quo* under which the sergeants and corporals split weekend days (Saturday and Sunday) off.<sup>1</sup>

The City filed a timely answer to the complaint.

The issue is:

During July 2009, did the Department unilaterally change corporals' days off in violation of ORS 243.672(1)(e)?

### RULINGS

The rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of employees who work in the City's Police Department (Department). The Association's bargaining unit includes employees in the classifications of police officer, corporal, parking control officer, police administrative technician, and records specialist.

2. The City is a public employer. The Department's management team includes the chief, a lieutenant, a captain, one administration sergeant, and three patrol sergeants.

#### Collective Bargaining Agreement

3. The Association and the City are parties to a collective bargaining agreement effective July 1, 2007 through June 30, 2010.

4. Article 2 of the parties' 2007-2010 Agreement, entitled "**MANAGEMENT RIGHTS**," provides in relevant part:

"Except as otherwise specifically limited by the terms of this Agreement or by the statutory duty to bargain, the City retains all of the customary, usual and exclusive rights, decision making, prerogatives, functions and

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<sup>1</sup>The Association also alleged in the complaint that the City had unilaterally changed the school resource officers' work week in violation of ORS 243.672(1)(e), but withdrew this allegation at the beginning of the hearing.

authority connected with, or in any way incident to, its responsibility to manage the affairs of the City or any part of it. Without limitation, but by way of illustration, the exclusive prerogatives, functions and rights of the City shall include the following:

- “1. To direct and supervise all operations, functions and policies of the department in which the employees in the bargaining unit are employed;
- “2. To manage and direct the work force, including, but not limited to, the right to determine the methods, processes and manner of performing work; \* \* \*; the right to determine schedules of work and vacations; \* \* \* \* .”

5. Article 3 of the parties’ agreement, entitled “**HOURS OF WORK,**” provides in relevant part:

“3.1 Workday

“The workday shall consist of ten consecutive hours for patrol personnel and eight consecutive hours for all other personnel. Detectives shall work a forty-hour week at eight hours per day with a paid one-half hour lunch.

“3.2 Workweek

“The workweek shall begin at 12:01 a.m. Sunday and end at 12:00 midnight Saturday. The normal work schedule shall consist of forty hours in a seven-day workweek. The workweek shall consist of a seven-day work schedule with five consecutive eight-hour days, with two days off or with four consecutive ten-hour days with three days off or any other schedule mutually agreed to by the City and the Association. The five consecutive eight-hour days for Detectives may be flexed to include Saturdays and Sundays without incurring any overtime pay up to forty hours per week.”

“\* \* \* \* \*

“3.4 Shift Bidding

“In the month of November, employees may, based on seniority, choose the sergeant for his/her work team to begin on or about January 1 of the following year.”

6. The City and the Association were parties to a collective bargaining agreement effective July 1, 2004 through June 30, 2007. The language in Article 2 and Article 3 of that agreement is the same as the language in the current agreement.

#### Patrol Division Operations and Schedules

7. Captain Jerry Matthews oversees the entire patrol division's operations; approximately 30 sworn officers work in the patrol division. Matthews has worked for the Department for 21 years as a patrol division lieutenant, criminal investigation lieutenant, narcotics operations sergeant, patrol division corporal, detective, and patrol officer.

8. The Department operates three patrol division teams. A full team includes a sergeant, a corporal, and five or six patrol officers. The teams are assigned to either graveyard, day, or swing shift. A team's shift assignment rotates every eight weeks.

9. The patrol team sergeants are the shift supervisors. They are responsible for overseeing all of their team's operations, including the scheduling of work, approval of vacation and training requests, report review, discipline, internal investigations, and monitoring officers' field activities.

10. When a sergeant is not present, the patrol team corporal operates as the shift supervisor and oversees the team's daily operations. A master officer, who is a senior patrol officer, operates as the team's shift supervisor in the absence of both the sergeant and corporal.

11. When a team's corporal is absent from work due to vacation or training, the sergeant may need to adjust his schedule to cover the corporal's time off. When this occurs, the sergeant may work more than four consecutive days in a week or have less than three consecutive days in a week off. When a team's sergeant is absent from work due to vacation or training, the shift supervisor position is typically filled by a master officer. If a master officer is not available, then the corporal's schedule is adjusted to backfill for the sergeant. Under the parties' contract, corporals must agree to work a schedule of more than four consecutive days in a week or have less than three consecutive days off in a week.

12. In November of each year, Captain Matthews prepares the annual team sign up sheet, which sets out the three patrol division teams, identifies the sergeant in charge of each team, and contains five or six blank spaces under each team. Once the sheet is posted, the corporals and the patrol officers sign up for a team based on seniority.

13. Since 2007, patrol division employees have operated under a weekly schedule of four consecutive days on and three consecutive days off (four/ten schedule). The Department operated under this same schedule from 2002 through 2004. During 2005 and 2006, the Department operated under a 12-hour-per-day work schedule. Under the 12-hour schedule, all team members worked the same days of the week and had the same days off.

14. Under the four/ten schedule, sergeants develop their teams' schedules for each eight-week rotation on shift schedule forms. A sergeant generally sets his own schedule and then schedules the team's corporal to work the days of the week that the sergeant is not scheduled to work, except for one overlapping day per week. In determining the corporal's schedule, the sergeant also takes into account a corporal's request for training, vacation, and days off. The sergeant then establishes various weekly schedules for the team's officers. The officers sign up for the established schedules based on seniority, after which the sergeant makes adjustments to the schedule to address coverage for days off due to training and vacations.

15. The graveyard shift begins at 9:00 p.m. and ends at 7:00 a.m. A sergeant or corporal scheduled to work a graveyard shift with Sunday, Monday, and Tuesday off, starts his Saturday shift at 9:00 p.m. on Friday and works until 7:00 a.m. Saturday morning. The officer is then off work from 7:00 a.m. Saturday morning through 9:00 p.m. Monday night. A sergeant or corporal on graveyard shift who is scheduled to be off work Thursday, Friday, and Saturday, stops work at 7:00 a.m. Thursday morning and starts his Sunday shift at 9:00 p.m. Saturday night.

16. Patrol division employees keep a record of the work performed each day. The team's corporal or master officer inputs this information into a monthly report form referred to as the daily field report. The report uses numbers to indicate the type of work performed on the days worked and is blank on days not worked. The report does not reflect whether days not worked are vacation days, regular days off, training days, or due to a trade with another officer. In some cases, the reports are not complete or accurate.

17. Captain Matthews does not review the schedules set by the sergeants. He believes that a sergeant has complete authority to set his team's days of work and days off based on the four/ten schedule, taking into account operational needs, service levels, staffing availability, and leave requests. In his experience, a team's sergeant and corporal are typically both in the office on either Wednesday or Thursday. Matthews is unaware of any agreement between the City and the Association or between the sergeants and corporals that provides that sergeants and corporals will split weekend days off.

## Sgt. Fetsch and Cpl. Carpenter

18. Sgt. Greg Fetsch began working for the Department in 1992. Fetsch worked as a corporal for several years under two different sergeants. During this time, Fetsch worked whatever days his sergeant scheduled him to work. Fetsch, who was trained by Sgt. Miller, has been a sergeant for approximately nine years. Miller never told Fetsch he was required to split weekends off with his corporal. Fetsch understood from Miller that the sergeants choose their days off. Fetsch has never been told what days he is to take off and establishes his own schedule without discussing it with his corporal. In establishing the team's schedule, Fetsch considers vacation requests, officers who want to work together, young officers, training requests, officers trading schedules, and the number of available officers. Since becoming a sergeant, Fetsch generally schedules his work days for Sunday through Wednesday because he runs the reserve police academy at Umpqua Community College on Saturdays.

19. Corporal (Cpl.) Robert Carpenter has worked at the Department for 16 years and has been a corporal for the last six years. When Carpenter decided to become a corporal, he understood that corporals had either Thursday, Friday, and Saturday off or Sunday, Monday, and Tuesday off. He also understood that the team sergeant picked the schedule the sergeant wanted to work, and that the corporal worked the opposite schedule. Carpenter is not aware of a specific agreement that requires that sergeants and corporals each have a weekend day off.

20. At the time Carpenter began working as a corporal, his sergeant never told him how his days off would be set. The only time the sergeant discussed the schedule with Carpenter was when adjustments needed to be made to address vacation or training days. Prior to July 2009, Carpenter's normal schedule on Sgt. Fetsch's team was Sunday, Monday, and Tuesday off. Carpenter understood that Fetsch chose to have Saturday off because of his work at Umpqua Community College.

21. Sometime prior to the end of 2008, Cpl. Carpenter told Sgt. Fetsch that he would not mind if Fetsch took both weekend days off because his children were not yet in school. Fetsch did not schedule both weekend days off at that time. At the end of 2008, Fetsch told Carpenter that he was going to start taking both weekend days off so he could be with his wife on Sundays. Carpenter told Fetsch he had no problem with this schedule because his wife did not work and his children were not in school. Fetsch thought they had a mutual understanding about the schedule.

22. After Sgt. Fetsch began working a schedule with both weekend days off, it appeared to Cpl. Carpenter that the other sergeants started to do the same. Carpenter also became aware that under the new schedule, only one senior officer could have both weekend days off. Previously, when Fetsch and Carpenter split weekends off, two senior officers had a schedule with both weekend days off.

Sgt. Eichenbusch and Cpl. Klopfenstein

23. Sgt. Jeff Eichenbusch has worked at the Department since 1996 and worked as a corporal from August 2005 until August 2007. When Eichenbusch was a corporal, his sergeant set his schedule, including his days off, without consulting with him. Normally, Eichenbusch and his sergeant each had a weekend day off. Eichenbusch was also an Association Board member and a member of the Association's bargaining team. During his time as a Board member, Eichenbusch does not recall that the issue of corporals' days off was ever raised as a violation of the parties' contract or at the bargaining table.

24. Eichenbusch became a sergeant in August 2007. As a sergeant, Eichenbusch establishes his team's schedule without talking to the corporal, unless the corporal has requested vacation leave. He schedules his days off based on his preference and any need to fill in for his corporal within the context of the four/ten schedule. Eichenbusch generally scheduled himself off on Thursday through Saturday so he could attend Oregon State University football games, which are traditionally played on either Thursday night or Saturday. When Eichenbusch changed his days off, he notified his corporal but did not seek his corporal's agreement to make the change. In late 2007, Eichenbusch scheduled himself off on Wednesday, Thursday, and Friday so he could attend out-of-town medical appointments with his wife. At the beginning of 2009, Eichenbusch scheduled himself off on Friday, Saturday, and Sunday so he could care for his children since his wife worked weekends. Except for these periods of time, Eichenbusch generally scheduled one weekend day off for himself and one for his corporal.

25. In 1999, Cpl. Klopfenstein began working at the Department. He left his employment with the Department after a couple of years to work with the Douglas County Interagency Narcotics team. After approximately three years, he returned to the Department as a master officer and became a corporal in August 2007. When Klopfenstein sought the promotion to corporal, he believed that sergeants and corporals each took one weekend day off because he had observed corporals and sergeants doing this since 2005. Klopfenstein never discussed his understanding that he would get one weekend day off with his sergeant.

26. Since becoming a corporal, Klopfenstein has normally worked Wednesday through Saturday, with Sunday, Monday, and Tuesday off, unless adjustments were made to the schedule due to vacations or training. Cpl. Klopfenstein and Sgt. Eichenbusch do not discuss training or vacation scheduling issues before Eichenbusch posts the sign-up schedule for officers.

27. In June or July 2009, Sgt. Eichenbusch told Cpl. Klopfenstein that he was scheduling both weekend days off for himself because his wife was now working on weekends. Eichenbusch did not ask for Klopfenstein's permission to make this change and Klopfenstein did not raise any objection to the change because his children are not in school. Klopfenstein believed that in the past such changes had been coordinated.

28. A few months prior to the hearing in this matter, Sgt. Eichenbusch scheduled Cpl. Klopfenstein to work Friday through Monday, with Tuesday, Wednesday, and Thursday off. After Eichenbusch set this schedule, Klopfenstein asked to have their overlap day fall on Thursday rather than Monday. Since it did not affect any of the patrol officers' schedules, Eichenbusch agreed to the change. After the change, Klopfenstein worked Thursday through Sunday.

29. Sgt. Eichenbusch's decision to take both weekend days off also affected the team's patrol officers' schedules. Since the sergeant was taking both weekend days off, only one officer could have a schedule with both weekend days off. When the sergeant and corporal split weekend days off, two officers were able to have a schedule with both weekend days off.

#### Sgt. Oelrich and Cpl. Dahl

30. Cpl. Travis Dahl has worked with the Department for 15 years. He has been a corporal since late 2006. When Dahl began working as a master officer in 2004 or 2005, he observed that corporals and sergeants always got one weekend day off. After Dahl became a corporal, Sgt. Bryan Oelrich told Dahl that he liked to have Sunday, Monday, and Tuesday off because he liked to watch football on Sunday and Monday night. As a result, Dahl was scheduled to be off on Thursday, Friday, and Saturday. Dahl said this worked for him because his children's games were usually on Saturday. At the time, Dahl told Oelrich he would like to have Sunday off sometimes to attend church with his wife. Oelrich said that he might be willing to change his Sunday off sometimes, but this never occurred. Oelrich has made schedule adjustments to address vacation, training, sick leave, and compensatory time needs, and so they can attend their children's school and sport functions. Until September 2009, Dahl believes he generally had Thursday, Friday, and Saturday off, and Oelrich generally had Sunday, Monday, and Tuesday off.

31. In September 2009, Sgt. Oelrich told Cpl. Dahl that he needed to have both weekend days off and that Dahl would have to work weekends. Dahl told Oelrich that this would be a hardship for him on swing shift because he would not see his children for two months and that Oelrich either had to split the weekends off on swing

shift or he would resign. Oelrich told Dahl he had not thought of the impact on swing shift and agreed that they could each have one weekend day off on swing shift. Dahl now works both Saturday and Sunday on day shift, but has one weekend day off on graveyard and swing shifts.

Past Work Schedules

32. From June 10, 2001 through August 4, 2001, Sgt. McGrew and Cpl. Miller were scheduled for the following days off:<sup>2</sup>

Weeks Starting	6/10/01	6/17/01	6/24/01	7/1/01	7/8/01	7/15/01	7/22/01	7/29/01
Sgt. McGrew	SU F SA	SU F SA	TH F SA	SU F SA	TH F SA	SU TH F SA	F SA	SU F SA
Cpl. Miller	M T W TH	M T	SU M T	M T W	M T W	M T W	SU M T W	M T

Summary of Information on this Chart: Shows 8 weekly patrol team schedules; during 2 of these weeks, the corporal had a Saturday or Sunday off.

33. From July 7, 2002 through November 23, 2002, patrol sergeants and corporals were scheduled for the following days off:

Weeks Starting	Sgt. McGrew	Cpl. Oelrich	Sgt. Miller	Cpl. Fetsch	Sgt. Dunbar	Cpl. Salerno
7/7/02	SU F SA	M T W				
7/14/02	SU F SA	M T W				
7/21/02	SU F SA	M T W				
7/28/02	SU F SA	M T W				
8/4/02	F SA	SU M T W	SU M T	F SA		
8/11/02	SU TH F SA	M T	SU M T	TH F		

<sup>2</sup>In this and subsequent charts, “M” represents Monday, “T” represents Tuesday, “W” represents Wednesday, “TH” represents Thursday, “F” represents Friday, “SA” represents Saturday, and “SU” represents Sunday. In addition, blank spaces reflect time periods where no information was provided and a “?” reflects indecipherable information.

Weeks Starting	Sgt. McGrew	Cpl. Oelrich	Sgt. Miller	Cpl. Fetsch	Sgt. Dunbar	Cpl. Salerno
8/18/02	TH F SA	SU M T	SU M T	W TH F SA		
8/25/02	TH F SA	SU M T	M T W	SU TH F SA		
9/1/02	SU F SA	M T W	SU M T	TH F SA		
9/8/02	TH F SA	SU M T	SU M T	TH F SA		
9/15/02	SU TH F SA	M T	SU M T	TH F SA		
9/22/02	W TH	SU M T SA	SU M T	TH F SA		
9/29/02			SU M T	TH F SA	SU M T	TH F SA
10/6/02			SU M T	TH F SA	SU M SA	TH F
10/13/02			SU M T	TH F SA	SU M SA	W TH F
10/20/02			SU M T	TH F SA	SU M T	W TH F SA
10/27/02			SU M T	TH F SA		
11/3/02			SU M T	TH F SA		
11/10/02			SU M T	TH F SA		
11/17/02			SU M T	TH F SA		

Summary of Information on the Chart: Shows 32 weekly patrol team schedules; during 20 of these weeks, a corporal had a Saturday or Sunday off.

34. From November 24, 2002 through March 24, 2003, the daily field reports and schedules show the following days not worked by patrol sergeants and corporals:<sup>3</sup>

Weeks Starting	Sgt. Fetsch	Cpl. Oelrich	Sgt. Miller	Cpl. Bryan	Sgt. Dunbar	Cpl. Salerno
11/24/02	T W	TH F SA	M T	M T W TH F SA		M T W
12/1/02	W TH F SA	SU M T F	SU M T	W TH F		SU M T

<sup>3</sup> The placement of the sergeants and corporals on the table is based on their team for that work period. When a corporal moves to a different team, the names in the table are realigned to reflect this. During the period of January 19 to March 15, 2003, where the information in Sgt. Miller's and Cpl. Oelrich's daily field reports conflicted with their schedules, we relied on the schedules since the issue before us is the *status quo* regarding scheduling.

Weeks Starting	Sgt. Fetsch	Cpl. Oelrich	Sgt. Miller	Cpl. Bryan	Sgt. Dunbar	Cpl. Salerno
12/8/02	TH F SA	SU M T W	SU M T	TH F SA		SU M T
12/15/02		SU M T W	SU M T W TH	F SA		SU M T
12/22/02		W TH F SA	SU M T	W TH F SA	W TH F SA	SU M T
12/29/02		SU M		SU M T W TH F SA	M TH F SA	SU M T W
1/5/03		SU M T W		TH F SA	W TH F SA	SU M T
1/12/03		SU M T W		TH F SA	TH F	SU M T W
1/19/03		TH F SA	SU M T	TH F SA	M T	T W F SA
1/26/03	SU M T	W TH F SA	SU M T	TH F SA	SU M T	T W TH F SA
2/2/03	SU M T TH SA	W F	SU M T	TH F SA	SU M T	W TH F SA
2/9/03	SA	SU M T W TH F	SU M T	TH F SA	SU M T W	SU M T W TH F SA
2/16/03	SU M T	W TH F SA	SU M T	TH F SA	SU M T	TH F SA
2/23/03		SU M T W TH F	SU M T	F SA	SU M T	TH F SA
3/2/03		W TH F	SU M T	F SA	SU M T	TH F SA
3/9/03		W TH F	SU M T	W TH F SA	SU M T W	TH F SA
3/16/03		T W TH F SA	SU M T	TH F SA	TH F SA	SU M T W
3/23/03		SU M			SU M	M

Summary of Information on this Chart: Shows 53 weekly patrol team schedules; during 28 of these weeks, a corporal had a Saturday or Sunday off.

35. From May 11, 2003 through July 5, 2003, Sgt. Miller and Cpl. Oelrich were scheduled for the following days off:

Weeks Starting	5/11/03	5/18/03	5/25/03	6/1/03	6/8/03	6/15/03	6/22/03	6/29/03
Sgt. Miller	MT	SU M T	SU M T	SU M T SA	SU M T	SU M T	SU M T	SU M T
Cpl. Oelrich	TH F SA	W TH F SA	TH F SA	W TH F	TH F SA	TH F SA	TH F SA	TH F SA

Summary of Information on this Chart: Shows 8 weekly patrol team schedules; during 6 of these weeks, a corporal had a Saturday or Sunday off.

36. From August 31, 2003 through October 25, 2003, Sgt. Miller and Cpl. Oelrich were scheduled for the following days off:

Weeks Starting	8/31/03	9/7/03	9/14/03	9/21/03	9/28/03	10/5/03	10/12/03	10/19/03
Sgt. Miller	SU M T	SU M T	SU M T	SU M T	SU M T	SU M T	SU M T W	M T
Cpl. Oelrich	TH F SA	TH F SA	W TH F SA	F SA	TH F SA	TH F SA	TH F SA	W TH F

Summary of Information on this Chart: Shows 8 weekly patrol team schedules; during 7 of these weeks, a corporal had a Saturday or Sunday off.

37. From December 25, 2003 through February 24, 2004, the daily field reports reflect the following days not worked by patrol sergeants and corporals:

Weeks Starting	Sgt. Fetsch	Cpl. Salerno	Sgt. Miller	Cpl. Oelrich	Sgt. Dunbar	Cpl. Bryan
12/25/03 (TH)		none	TH F	TH F SA	TH F SA	none
12/28/03		SU M T TH	M T	TH F SA	W TH F SA	SU M T
1/4/04		SU M T	SU M T	TH F SA	W TH F SA	SU M T
1/11/04		SU M T W	SU M T	W TH F SA	W TH F SA	SU M T
1/18/04		TH F SA	M T W SA	SU M T	TH F SA	SU M TH F
1/25/04		TH F SA	SU M T	TH F SA		SU M T
2/1/04		TH F SA	SU M T	TH F SA		SU M T
2/8/04		TH F SA	SU M T	TH F SA		SU M T
2/15/04		W TH F SA	SU M T	TH F SA		SU M T F
2/22/04 (ends 2/24)		T	SU M T	none		SU M T

Summary of Information on this Chart: Shows 30 weekly patrol team schedules; during 11 of these weeks, a corporal had a Saturday or Sunday off.

38. From December 24, 2006 through February 24, 2007, the Department's schedules and field activity reports reflect that the sergeants and corporals did not work on the following days:

Weeks starting	Sgt. Miller	Cpl. Eichenbusch	Sgt. Oelrich	Cpl. Dahl	Sgt. Fetsch	Cpl. Carpenter
12/24/06	M T	TH F SA	M T			M T
12/31/06	SU M T	TH F SA	SU M T			SU M T
1/7/07	SU M T W	TH F SA	SU M T			SU M T
1/14/07	SU M T	TH F SA	SU M T	TH F SA		SU M T
1/21/07	SU M T	TH F SA	SU M T	TH F SA		SU M T
1/28/07	SU M T	TH F SA	SU M T	TH F SA		SU M T W TH
2/4/07	SU M T	TH F SA	SU M T	TH F SA		M T
2/11/07	SU M T W	TH F SA	SU M T	W TH		SU M T W
2/18/07	SU M T	TH F SA	SU M T	W TH F		M T

Summary of Information on this Chart: Shows 27 weekly patrol team schedules; during 12 of these weeks, a corporal had a Saturday or Sunday off.

39. From May 6, 2007 through June 30, 2007, Sgt. Miller and Cpl. Eichenbusch were scheduled for the following days off:

Weeks Starting	5/6/07	5/13/07	5/20/07	5/27/07	6/3/07	6/10/07	6/17/07	6/24/07
Sgt. Miller	SU M T	M T W	SU M T	SU M T				
Cpl. Eichenbusch	TH F SA	SU TH F	TH F SA	TH F SA	TH F SA	TH F SA	W TH F SA	none

Summary of Information on this Chart: Shows 8 weekly patrol team schedules; during 6 of these weeks, a corporal had a Saturday or Sunday off.

40. From August 25, 2007 through August 1, 2009, patrol sergeants and corporals were scheduled for the following days off:

Weeks Starting	Sgt. Eichenbusch	Cpl. Klopfenstein	Sgt. Fetsch	Cpl. Carpenter	Sgt. Oelrich	Cpl. Dahl
8/26/07	M F ?	? T W				
9/2/07	F ?	M T W				
9/9/07	TH F ?	M T W				
9/16/07	?	M T W TH				
9/23/07	F ?	M T W				
9/30/07	F ?	M T W				
10/7/07	F ?	M T W				
10/14/07	F ?	M T W				
10/21/07	SA	SU	SU TH F	M T SA		
10/28/07	W TH F	SU M T SA	TH F	SU M T SA		
11/4/07	W TH F	SU M T SA	TH F SA	SU M T		
11/11/07	T W TH F	SU M SA	SU TH F SA	M T		
11/18/07	T W	SU TH F SA	TH F SA	SU M T		
11/25/07	T W TH F	SU M	SU TH F	M T SA		
12/2/07	W TH F	SU M SA	W TH F SA	SU M T		
12/9/07	W TH F	SU M SA	TH F	SU M T		
12/16/07	W TH F	SU TH F	TH F SA	M T W	SU M T	TH F SA
12/23/07	W TH F	? W	TH F SA	SU M T W	SU M T	TH F SA
12/30/07	W TH F	SU M SA	TH F SA	SU M T W TH	SU M	TH F SA
1/6/08	W TH F	SU M T SA	SU M SA	none	SU M T W	SA
1/13/08	TH F SA	M T W	W TH	SU M T	SU M T	W TH F SA
1/20/08	SU F SA	? T	T W TH SA	SU M T	SU M T	F

Weeks Starting	Sgt. Eichenbusch	Cpl. Klopfenstein	Sgt. Fetsch	Cpl. Carpenter	Sgt. Oelrich	Cpl. Dahl
1/27/08	TH F SA	SU M T W	W TH F SA	SU M T	SU M T	W TH F SA
2/3/08	TH F SA	SU M T	W TH	SU M T	SU M T	W TH F SA
2/10/08	W TH F	SU SA				
2/17/08	? SA	SU ?				
2/24/08	W TH F SA	SU M T W				
3/2/08	W TH F SA	SU M T W				
3/9/08	TH F SA	TH F SA				
3/16/08	W TH F	TH F SA				
3/23/08	W TH F	TH F SA				
3/30/08	W TH F	TH F SA				
4/6/08	W TH F	TH F SA	W TH F SA	SU M T		
4/13/08	W TH F	TH F SA	TH	SU M T W		
4/20/08	W TH F	TH F SA	W TH F SA	SU M T		
4/27/08	W TH F	TH F SA	SU M F	T W		
5/4/08	TH F SA	SU M T				
5/11/08	TH F SA	SU M T				
5/18/08	TH F SA	SU M T				
5/25/08	W TH F	SU M T				
6/1/08	TH F SA	SU M T	W TH F SA	SU M T		
6/8/08	TH F SA	SU M T	none	SU M T W SA		
6/15/08	TH F SA	SU M T	TH F SA	SU M T		
6/22/08	W TH F	SU M T	SU T W TH F	M T		

Weeks starting	Sgt. Eichenbusch	Cpl. Klopfenstein	Sgt. Fetsch	Cpl. Carpenter	Sgt. Oelrich	Cpl. Dahl
6/29/08	F SA	M T W	TH F SA <sup>4</sup>	SU M T	TH F SA	SU M T
7/6/08	SU M F	M T W	TH F SA	SU M T	TH F SA	SU M T W
7/13/08	SU F SA	M T W	TH F SA	SU M T	SU F SA	M T
7/20/08	SU F SA	M T W	TH F SA	SU M T	W TH F	SU M T
7/27/08	SU F SA	M T W				
8/3/08	SU F SA	M T W				
8/10/08	SU SA	M T TH				
8/17/08	SU F SA	M T W				
8/24/08	TH F SA	SU M T			M T	SU TH F SA
8/31/08	TH F SA	SU M T			SU M T	TH F SA
9/7/08	TH F SA	SU M T			SU M T	W TH F SA
9/14/08	TH F SA	SU M T			SU M T	F SA
9/21/08	TH F SA	SU M T			SU M T	TH F SA
9/28/08	TH F SA	SU M T			SU M T	TH F SA
10/5/08	TH F SA	SU M T SA			SU M T	TH F SA
10/12/08	TH F SA	SU M			SU M T	TH F SA
10/19/08	TH F SA	SU M T				
10/26/08	TH F SA	SU M T				
11/2/08	TH F SA	SU M T				
11/9/08	TH F SA	SU M T				
11/16/08	TH F SA	SU M T				

<sup>4</sup>Exh. C-14 at 4 and Exh. R-24 at 28-29 include inconsistent information about the days worked by Fetsch and Carpenter during the period of June 29, 2008 through July 26, 2008. We rely on the information in Exh. R-24 since it appears to be a schedule, while C-14 appears to be a handwritten record of hours actually worked.

Weeks Starting	Sgt. Eichenbusch	Cpl. Klopfenstein	Sgt. Fetsch	Cpl. Carpenter	Sgt. Oelrich	Cpl. Dahl
11/23/08	TH F SA	SU M T				
11/30/08	SU F SA	SU M T				
12/7/08	W TH F	SU M T				
12/14/08	F SA	M T W	SU F	M T W TH		
12/21/08	SU F SA	M T W	SU F SA	T W		
12/28/08	SU F SA	M T W	SU M T TH	M T W		
1/4/09	SU F SA	M T W	TH F SA	M T W		
1/11/09	SU F SA	M T W	TH F SA	SU M T		
1/18/09	SU F SA	M T W	TH F SA	SU M T		
1/25/09	SU F SA	M T W	TH F SA	SU M T		
2/1/09	SU F SA	M T W	TH F SA	SU M T		
2/8/09	SU F SA	M T W	TH F SA	SU M T W		
2/15/09	SU F SA	M T W	T W TH F SA	M T		
2/22/09	SU F SA	M T W	F SA	SU M T		
3/1/09	SU F SA	M T W	TH F	SU M T		
3/8/09	TH F SA	SU M T	TH F SA	M T W		
3/15/09	TH F SA	SU M T	SU F SA	M T W		
3/22/09	TH F SA	SU M T	SU TH F SA	M T W		
3/29/09	TH F SA	SU M T	SU F	M T W		
4/5/09	TH F SA	SU M T	SU F SA	M T W	SU M T	TH F SA
4/12/09	F SA	SU M T	SU F SA	M T W	SU M T	F
4/19/09	SU TH F SA	SU M T	SU F SA	M T W	SU M T	W TH F SA
4/26/09	W TH F	SU M T	?	M T W	SU M T	TH F SA

Weeks Starting	Sgt. Eichenbusch	Cpl. Dahl	Sgt. Fetsch	Cpl. Carpenter		
5/3/09	TH F SA	SU M T W	SU F SA	M T W		
5/10/09	SU F SA	M T W	SU F SA	M T W		
5/17/09	SU TH F SA	M T W	SU F SA	M T W		
5/24/09	F SA	T W	SU M SA	M T W		
5/31/09	SU SA	M T W	SU SA	M T W		
6/7/09	SU F SA	M T W	SU F SA	M T W		
6/14/09	SU F SA	M T W	SU F SA	M T W		
6/21/09	SU F SA	M T W	SU TH F SA	M T W		
6/28/09	SU F SA	M T W	TH F SA	SU M T W		
7/5/09	SU F	M T W	TH F SA	M T		
7/12/09	SU F SA	M T W	TH F SA	SU M T		
7/19/09	SU F SA	M T W	TH F SA	SU M T		
7/26/09	SU F SA	M T W	TH F SA	SU M T		

Summary of Information on this Chart: Shows 186 weekly patrol team schedules; during 82 of these weeks, a corporal had a Saturday or Sunday off.

#### Demand to Bargain

41. Officer David Lund has been Association president since fall of 2006. Lund believed that sergeants and corporals worked together to develop schedules and that they normally split weekend days off. Lund knows of no formal agreement that requires sergeants and corporals to split weekend days off. He has never discussed schedules with the corporals and sergeants.

42. In the summer of 2009, Cpl. Carpenter complained to Lund that although he and Sgt. Fetsch had agreed that Fetsch would have weekends off for a period of time, Fetsch now refused to return to a schedule that split weekend days off. By letter to the City dated July 24, 2009, the Association notified the City that it believed that the sergeants had unilaterally changed the pattern of splitting weekend days off with the corporal assigned to their team, and demanded to bargain over this change.

43. By letter to the Association dated August 4, 2009, the City denied that it had made a unilateral change, and asserted that even if a change had occurred, it did not affect a mandatory bargaining topic.

44. By letter to the City dated August 19, 2009, the Association again asserted that a change had occurred and renewed its demand to bargain.

45. By letter to the Association dated September 16, 2009, the City again denied that it made a unilateral change in a mandatory subject of bargaining and denied any obligation to bargain.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. The complaint is timely filed.

The City asserts that we must dismiss the complaint because it was not timely filed. Under ORS 243.672(3), an injured party must file an unfair labor practice complaint “not later than 180 days following the occurrence of an unfair labor practice.” The Association filed this complaint on September 24, 2009. Accordingly, the complaint is timely for any alleged unfair labor practice that occurred on or after March 29, 2009.

The Association alleges that the City unilaterally changed corporals’ days off in violation of its good faith bargaining duty under ORS 243.672(1)(e). Under the statute, we must determine when this change occurred.

The City contends that some sergeants began scheduling both weekend days off for themselves in October 2007; because the Association failed to file its complaint within 180 days of this alleged change in corporals’ weekend schedules, the City argues the complaint is untimely.

The record shows that in summer 2009, Cpl. Carpenter complained to the Association that Sgt. Fetsch refused to return to a schedule that split weekend days off between the corporal and sergeant. (Finding of Fact 42.) As a result of this complaint, the Association became aware of an alleged change in the past practice of corporals’ weekend schedules; on July 24, 2009, the Association demanded that the City bargain about the change. The limitation period in ORS 243.672(3) begins to run when a labor organization “knows or reasonably should know that an unfair labor practice has occurred.” *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 189,

260 P3d 619 (2011). There is no evidence that the Association knew about the schedule change until Cpl. Carpenter complained about it. Although the record does not clearly establish the exact date of Carpenter's complaint, it occurred sometime in the summer of 2009 (*i.e.*, after June 20, 2009). Because the unfair labor practice complaint was filed well within 180 days of the date on which the Association became aware of an allegedly unlawful unilateral change, the complaint is timely.

3. The City did not violate ORS 243.672(1)(e) by changing corporals' days off.

The Association alleges that sergeants had a long-standing and well-established practice of scheduling weekend work so that the corporals and sergeants each had one weekend day off. In summer 2009, the Association became aware that sergeants had changed this practice and no longer split weekend days off with corporals. The Association contends that this change in corporals' weekend schedules constitutes a unilateral change in the *status quo* in violation of the City's good faith bargaining duty under ORS 243.672(1)(e).

ORS 243.672(1)(e) generally requires that an employer bargain prior to changing existing employment conditions related to mandatory subjects of bargaining during the term of a contract. *American Federation State, County and Municipal Employees, Local No. 2752 v. Wasco County*, Case No. C-176-75, *order on remand*, 4 PECBR 2397 (1979), *aff'd*, 46 Or App 859, 613 P2d 1067 (1980). To determine if a public employer failed to comply with its bargaining obligation, we apply the analysis set out in *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008):

"In a unilateral change case, we must identify the *status quo* and determine whether the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject for bargaining. If it does, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. If the employer failed to complete its bargaining obligation, we then consider any affirmative defenses the employer raised (*e.g.*, waiver, emergency, or failure to exhaust contract remedies)."

Under this analysis, we must first determine the *status quo* regarding the scheduling of days off for corporals. The *status quo* is generally established by an expired collective bargaining agreement, past practice, work rule, or policy. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 664-65, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *recons*, 19 PECBR 895 (2002), *aff'd*, 187 Or App 92, 67 P3d 951 (2003). Here, the Association alleges a past

practice based on “longstanding work schedules [which] consisted of a Wednesday through Saturday shift and a Sunday through Wednesday shift,” normally resulting in a team’s sergeant and corporal being scheduled off either Thursday, Friday, and Saturday or Sunday, Monday, and Tuesday. (Complaint at 3.)

Because the Association asserts a change in the *status quo* based on the existence of an established past practice, the Association has the burden of proving the past practice. OAR 115-035-042(6); *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987 (2005). A course of conduct constitutes a past practice if it is clear and consistent, occurs repetitively over a long period of time, and is acceptable to both parties. We also consider the circumstances under which the past practice was created, and whether both parties mutually acknowledge the practice. 20 PECBR at 993.

The Association relied on the following testimonial evidence to support its claim that sergeants established a past practice of splitting weekend days off with corporals:

- the corporals’ understanding when they were promoted that they would split weekend days off with sergeants, and would agree to any schedules that did not include a Saturday or Sunday off;
- Association President Lund’s and Sgt. Eichenbusch’s analysis of some prior schedules;
- Sgt. Eichenbusch’s explanation that he normally scheduled himself to work Sunday through Wednesday so he could attend football games; and
- Capt. Matthews’s assertion that corporals and sergeants typically had their overlap day on Wednesday.<sup>5</sup>

Yet the best evidence in this case is neither the corporals’ and sergeants’ recollections of past schedules, nor the parties’ analysis of a few selected schedules. The best evidence of the existence of a past practice is the schedules themselves.

The schedules in the record do not provide comprehensive information for the period from June 10, 2001 through June 30, 2007. (Findings of Fact 32 through 39.) Those schedules in the record show some blocks of time when sergeants and corporals split weekend days off, but also show many variations from this pattern. For example, from June 10, 2001 through August 4, 2001, Cpl. Miller had one weekend day off during two weeks of this eight-week period. From July 7, 2002 through

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<sup>5</sup>We note that Captain Matthews actually testified that he generally observed both a team’s sergeant and corporal in the office on Wednesday or Thursday.

September 28, 2002, then-Cpl. Oelrich had one weekend day off for five weeks of this 12-week period. From September 29, 2002 through October 26, 2002, Cpl. Salerno had a weekend day off for two weeks of this four-week period.<sup>6</sup>

For the period from August 26, 2007 through July 26, 2009, the record contains relatively complete weekly patrol team schedules. Although there are some periods when sergeants and corporals split days off, *e.g.*, from June 28, 2009 through July 26, 2009, there are many weeks where this was not the case. For example, Cpl. Klopfenstein was scheduled for no weekend days off during the eight-week period from August 26, 2007 through October 20, 2007, the eight-week period from June 29, 2008 through August 23, 2008, and the 12-week period from December 14, 2008 through March 7, 2009. Cpl. Dahl was scheduled for a weekend day off during one week of the eight-week period from May 3, 2009 through June 27, 2009. In addition, Cpl. Carpenter was scheduled for no weekends off during the 16-week period from March 8, 2009 through June 27, 2009. Out of 186 weekly patrol schedules reported for the period from August 26, 2007 through July 26, 2009, corporals and sergeants split weekend days off in 86 of these weeks (about 46 per cent of the time).

The Association argues that the normal Department practice was for corporals and sergeants to split weekend days off and that any variation in this scheduling resulted from the need to accommodate vacations and training. We are unable to determine from this record, however, how and why sergeants made their scheduling decisions. The Department's monthly reports do not show whether days not worked were vacation days, regularly scheduled days off, training days, or a day off taken because of a trade with another officer. (Finding of Fact 16.)

Nor does the evidence show that any variations from schedules in which corporals and sergeants split weekend days off were based on agreements between the sergeants and corporals. Sgt. Fetsch was the only sergeant who testified about an agreement with his corporal concerning weekend schedules: Fetsch and Carpenter agreed that for a period of time, Fetsch would have both weekend days off. Neither Sgt. Eichenbusch nor Cpl. Klopfenstein testified regarding any specific agreement or understanding about weekend schedules in 2007, 2008, and early 2009. To the contrary, Eichenbusch testified that he never sought his corporal's agreement when setting the team's schedule. Although Klopfenstein recalled that past schedule changes were generally coordinated, he did not testify that these changes were agreed to by the corporal.

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<sup>6</sup>During one of the weeks that Cpl. Oelrich did not have a weekend day off, he only had two consecutive days off. Although the current contract requires three consecutive days off, there is no evidence regarding the contract language in effect in 2002.

The Association has failed to prove the existence of a *status quo* established by a consistent past practice that required sergeants to split weekend days off with corporals, or create a schedule in which corporals had one weekend day off.<sup>7</sup> Accordingly, the City did not violate ORS 243.672(1)(e) by changing the *status quo* in scheduling corporals' days off. We will dismiss the complaint.

ORDER

The complaint is dismissed.

DATED this 13 day of March 2012.

  
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Susan Rossiter, Chair

  
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Paul B. Gamson, Board Member

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\*Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Member Logan did not participate in the deliberations and decision in this case.

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<sup>7</sup>Since we find that no violation occurred because the Association did not prove the existence of the *status quo*, we need not address the City's other arguments.